United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4073

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CORAZON HERMOSA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S BRIEF

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STATUTES INVOLVED

Section 244(a)(1) of the Immigration and Nationality Act; 8 U.S. Code 1254(a)(1).

"Sec. 244.(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and--

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

8 CFR 244.1.

"Pursuantto Part 242 of this chapter and section 244 of the Act a special inquiry officer in his discretion may authorize the suspension of an alien's deportation; o., if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States,a special inquiry officer in his discretion may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the special inquiry officer when first authorizing voluntary departure, and under such conditions as the district director shall direct. An application for suspension of deportation shall be made on Form I-256A."

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PRELIMINARY STATEMENT

On April 10, 1975 a motion to reopen the deportation proceedings brought against Corazon Hermosa was made to the Board of Immigration Appeals. Hermosa sought to reopen her case in order to apply for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act. The motion was denied by the Board, which found that Hermosa had failed to make a "prima facie" showing of hardship.

FACTS

Corazon Hermosa is a native and citizen of the Republic of the Philippines. Hermosa arrived in the United States on December 24, 1966 at Honolulu, Hawaii, as a non-immigrant student.

On July 15, 1970 Hermosa was found deportable by Judge Joseph Mack of the Immigration Court. His decision was affirmed by the Board of Immigration Appeals on February 8, 1971. On April 10, 1975 Corazon Hermosa, by her attorneys, made a motion to the Board of Imaigration Appeals for a re-opening of her deportation so that she could apply for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act. That motion was denied.

Corazon Hermosa has continuously resided in the United States since her arrival on December 24, 1966. She has not left the country at any time.

Her sister, Bella Aurora Hermosa Villairota, is a physician and resides in New Rochelle, New York. She is a legal permanent resident and will be eligible for United States citizenship on March 5, 1976. Pilar Diaz Hermosa is Corazon Hermosa's mother. She is presently in the United States in visitor status and will apply for permanent residence when Villairta becomes a citizen. The remaining members of the Hermosa family are married, in the Philippines with families of their own. The only family Corazon Hermosa has known for the last nine years is here in the United States. If she had to return to the Philippines she would be separated from them indefinitely.

Corazon Hermosa is not able to secure a visa abroad. She is a hairdresser and beautician. The likelihood of Labor Department certification is nill; and even if she could be certified, she would have the shattering burden of dealing with the Philippine quota, which may never open again for skilled workers. A mere incident of birth has dealt her a great hardship. If she had been born in any other country, she might have immigrated by virtue of her skills, or eventually through her sister, a potential United States citizen. None of this is available to Corazon Hermosa because of the place in which she was born.

Corazon Hermosa is thirty-two years old. She has lived in the United States for almost a third of her life. She has become a part of her adopted country; the Philippines would be a foreign and strange place to her. She cannot return to a land and culture which are no longer hers.

In her nine year absence the Philippines have changed also. Martial Law, imposed ~~to~~ BY Ferdinand Marcos, has changed the former United States possession into an armed camp, with no liberty and no rights, except for those with power.

Because of Hermosa's length of stay in the United States, good moral character, the manner of her entry and

the extreme hardship she would suffer if deported, a motion was made to the Board of Immigration Appeals, which had last acted on her case, that her deportation be reopened for the purpose of a suspension of deportation application. The Board of Immigration Appeals denied the motion, stating that she had failed to make a "prima facie" showing of "hardship."

ARGUMENT

POINT I

THIS COURT CAN REVIEW THE DECISION MADE BY THE BOARD OF IMMIGRATION APPEALS ON THE HERMOSA MOTION.

As in all judicial review of final administrative orders, the Board of Immigration Appeals is reviewable in the Court of Appeals for abuse of discretion. This does not mean, however, that an administrative determination is sacrosanct as long as it can be supported by some form of logical explanation. The administrative tribunals must adhere to the norms set forth in the statute, by the regulations and by the Courts.

In the case of Wong Wing Hang v. The Immigration and Naturalization Service (360 Fed. 2d 715), this Court considered a petition to review a denial of suspension of deportation by the Board of Immigration Appeals. The petition was denied, butthe Second Circuit Court of Appeals set forth its test upon review of administrative determination.

This Court stated that upon review of a determination as to eligibility for discretionary suspension of deportation is subject to judicial scrutiny for abuse; that is, to check that the Board of Immigration Appeals has properly applied

the conditions prescribed in the statute.

The test, therefore, is not that the Board can explain an individual decision taken out of context, but, can the Board in view of those conditions presented by the statute, and those decisions made in similar cases support the decision made in the case at bar.

The Board's decision here is not an isolated one. There are many applications under Section 244(a)(1) made every year. The norms established by the Board should be uniformly and fairly applied. In review of the Board's action in the case at bar for abuse, the Court should consider also the action taken on other applications.

POINT II

THAT HERMOSA DID MAKE A PRIMA FACIE SHOWING OF EXTREME HARDSHIP THAT WOULD WARRANT A REOPENING OF THE DEPORTATION.

The Board of Immigration Appeals set forth the factors to be considered regarding the "extreme hardship" required by the Act in the Matter of S _____ (5 I&N Dec. 409). The Service must consider:

a) Length of residence,

b) Family ties,

c) Possibility of obtaining a visa abroad,

d) Financial burden in proceeding abroad for a visa,

e) Health and age of the alien.

It is not necessary that all five elements be present to prove the requisite hardship and the list is not exclusive. The Board has exercised some latitude in accepting novel items as proof of the requisite hardship. In the Matter of S ____, (supra), the fact that the alien had been a long resident in the United States, had limited assets and was faced with a long delay in obtaining a visa was denied sufficient hardship. Another long resident who had no home in the country of origin was found to have the requisite hardship (Matter of H, 5 I&N Dec. 416).

The latitude has on occasion been expanded to include those who faced political hardship. Judge Julius Goldberg of the Immigration Court found in the Matter of Avelino Coronado (A18 493 359), an unreported decision, that it would be "extreme hardship" for a Filipino to return to his homeland because Martial Law had been declared; life under Martial Law has been found to be the "extreme hardship" on an application for suspension of deportation.

How can the Board find that Corazon Hermosa has made no prima facie showing of hardship? A prima facie showing merely calls for an answer. Any alien who presents

a showing of hardship within the framework set forth above has a prima facie case. The contentions will be subject to cross examination before an Immigration Judge and a thorough investigation.

The record and facts in the case at bar make a prima facie case on their own. Corazon Hermosa has been in the United States almost nine years; her family is here; the only home she knows is here. She is not eligible for a visa and cannot leave the United States without the prospect of endless separation from her sister and mother. She has spent almost a third of her life here and may be sent to a land she does not know, dominated by a dictator who uses the scapegoats of subversives and the whip of martial law to solidify his control over a former democratic republic and United States possession.

Considering the statute and the decisions made in other cases of this kind, it is unthinkable that the Board would claim that there has been no prima facie showing in this case. The Board, in a proper exercise of its duties, should have granted the motion and referred the case to an Immigration Judge for adjudication.

POINT III

THE DENIAL OF HERMOSA'S MOTION TO REOPEN BY THE BOARD OF IMMIGRATION APPEALS WAS AN ABUSE OF DISCRETION.

The statute Section 244(a)(1) requires that an application for suspension of deportation be made before an Immigration Judge during a deportation hearing. The original version of the law required that the application be made before a final order of deportation was entered. A 1962 amendment eliminated the requirement that the application be made before a final order was served. This change indicates a legislative intent behind the amendment was to permit relief via a motion to reopen.

Now an alien who is under an order of deportation can move to reopen for suspension as long as he is still in the United States and can present a prima facie showing of eligibility.

An example of the extremes to which an alien can go and still have his case reopened is presented by Siang Kee Wang v. Immigration and Naturalization Service (413 Fed 2d 286, 9th Cir. Court of Appeals, June 24, 1969).

In the Siang case, the alien entered the United States by jumping ship in 1954. He was found deportable in

1955. Upon receipt of his surrender notice in 1965, he fled and remained a fugitive until his attorney moved to reopen his case for a suspension application in 1967.

The motion was granted and the application approved by the Special Inquiry Officer. The Board reversed the Immigration Court and the Circuit Court vacated the Board's finding, agreeing with the original decision.

If the Sieng case was reopened while the alien was a fugitive, why wasn't this case reopened while Corazon Hermosa was in the custody of the Service? The only explanation given by the Board was that Hermosa had failed to make a prima facie showing of hardship. The abuse of discretion practiced here by the Board in refusing to give this woman an opportunity to be heard, is grounds for a reversal of the decision.

The statute, the facts, the cases cited, and the mandate for "humane administration" of the immigration laws require that a person who presents a prima facie case be given an opportunity for a hearing. The very least that Corazon Hermosa is entitled to is a hearing on the merits of her case. Only an Immigration Judge can adjudicate the suspension application, for the Board to deny her that opportunity after the facts here presented is an abuse of discretion.

CONCLUSION

This Court can review the determination made by the Board of Immigration Appeals. Doing so in light of the norms set by the Board in other cases, the Court should reverse the Board and remand the case to an Immigration Judge for adjudication.

Respectfully submitted,

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